Study I-100 February 8, 2023

Memorandum 2023-10

Equal Rights Amendment: Scope of Sex Equality Provision

In 2022, the Legislature adopted a resolution that authorizes and requests the Commission[1] to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]"[2] More specifically:

> [The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission's report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination….[3]

The Commission commenced work on this topic in 2022, considering an introductory memorandum describing a proposed approach for the study.[4] Specifically, the proposed approach included two stages: first, the Commission will examine the possibility of codifying a provision in state law to achieve the effect of the Equal Rights Amendment ("ERA") (such a provision is referred to hereafter as a "sex equality provision"); and second, the Commission would apply the resulting rule to existing California law to remedy defects (i.e., provisions that have discriminatory language or impacts).

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

   The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.
2. 2022 Cal. Stat. res. ch. 150.
3. *Id*.
4. Memorandum 2022-51.

LANGUAGE OF THE ERA

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[5]

In order to codify a sex equality provision to achieve the effect of this language, the Commission must first consider how this language should be understood.

This memorandum discusses the scope of the term "sex" for the purposes of codification of a sex equality provision.

SCOPE OF THIS MEMORANDUM

One of the challenging aspects of seeking to understand the effect of the ERA is that there are several related and (in some instances) interconnected bodies of laws that help to shed light on this question.

This memorandum focuses on one of those bodies of law – federal employment discrimination law. As discussed in this memorandum, the history of federal employment law includes consideration of what types of classifications and treatment constitute discrimination "because of … sex." The legal history also highlights the potential pitfalls of taking too narrow of a view of what constitutes sex-based discrimination and disparate impacts in the workplace. The impact of employment discrimination laws meant to remedy disparities is blunted when those laws are drafted or construed in a manner that that does not fully account for the sex-based inequities faced in the workplace.

This memorandum does not address constitutional equal protection law. Equal protection law will itself be a subject of a future memorandum.

It is worth emphasizing that these different laws (statutes, constitutional provisions) that will be discussed in this study are not binding legal authority as to the meaning of the ERA itself. In the staff's view, related bodies of law can provide helpful context for assessing the scope of the ERA and how the ERA is expected to change the existing legal doctrines. For instance, in this memorandum, federal employment discrimination law provides important context and background for understanding the scope of sex discrimination and highlights potential pitfalls to be aware of when seeking to address existing sex-based inequities.

5. H.J. Res. 208 (1972), 86 Stat. 1523.

While the staff welcomes suggestions on other laws, case law, and legal doctrine to examine, the staff notes that these materials will not provide a definitive answer as to the scope of the ERA, which is an issue the Commission will need to decide for the purposes of its work.

DRAFTING OF SEX EQUALITY PROVISION, GENERALLY

As it proceeds with this work, the Commission will need to consider how much detail to include in the language of the provision itself.

As noted at a prior Commission meeting, the Commission should be mindful of drafting this provision in a robust way that provides sufficient guidance as to its scope, while also avoiding rigidity and overly narrow framing. This approach is consistent with the general character of the ERA, which is a broad constitutional protection, the precise limits of which are still yet to be assessed in the case law.

The staff also notes that the Commission will need to decide whether this sex equality provision should be added to the California Codes or the State Constitution. That decision, which will be addressed later in this study, could affect how the provision is drafted and the level of detail it includes.

SUBSTANTIVE SCOPE OF SEX EQUALITY PROVISION

In assessing how to codify a sex equality provision in state law, the Commission will need to consider the substantive application of the provision.

More specifically, the Commission will need to consider whether, for the purposes of a sex equality provision, "sex" includes:

- A sex-based classification. In other words, would the provision permit any separate sex-based rules and, if so, in what context?
- A classification that involves sex and some other characteristic (e.g., marital status, parenthood, age, etc.).
- A classification involving a biological characteristic that is associated with one sex or the other (e.g., pregnancy, prostate cancer).
- A classification related to nonconformity to stereotypes or expected characteristics associated with an individual's sex.
- Sexual harassment.
- A classification based on gender identity, gender expression, or sexual orientation.

The substantive questions presented above have been considered by courts in case law related to Title VII of the federal Civil Rights Act of 1964, which prohibits employment discrimination.[6] And, the history and evolution of the understanding of what constitutes sex discrimination under that act may provide helpful context as the Commission undertakes its work on this topic. While this case law is not binding on the Commission in terms of its assessment of the meaning of its charge, these cases should help shine a light on the general legal understanding of what would constitute "discriminat[ing] against any individual … because of such individual's … sex."[7]

As noted in a recent case, some of the listed issues above may "to the modern eye … plainly" constitute sex discrimination, but these were "hotly contested for years following Title VII's enactment."[8]

After a discussion about terminology, this memorandum discusses key federal laws pertaining to workplace discrimination, while also providing some information about the scope of select California anti-discrimination laws.

TERMINOLOGY: SEX, GENDER, SEXUAL PREFERENCES, AND SEX OR GENDER STEREOTYPES

As indicated above, the assignment to the Commission directs the Commission to study discrimination and disparate impacts "on the basis of sex." This is consistent with the language of the ERA, which states, in part, that "equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex."[9]

Sex, gender, sexual orientation, and sex or gender stereotypes are related, but distinct, concepts, as described in more detail below. Under each of the discussions, related terms are identified and described. In materials discussing these topics, many acronyms are used. In general, the staff will use acronyms sparingly and will endeavor to define any acronyms used in the written materials,

6. Title VII is codified at 42 U.S.C. § 2000e *et seq.*. See generally Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 *et seq.*).
7. 42 U.S.C. § 2000e-2(a)(1).
8. *Bostock v. Clayton County* (2020) 590 U.S. __, 140 S. Ct. 1731, 1752.
9. See Congressional Research Service, The Proposed Equal Rights Amendment: Contemporary Ratification Issues 14-15, R42979 (Updated Dec. 23, 2019), *available at* https://sgp.fas.org/crs/misc/R42979.pdf (reproducing text of House Joint Resolution 208 from 92nd Congress, 1972).

but notes that, in some instances, the exact wording underlying the acronym may not be universally agreed upon.[10]

As the Commission undertakes this work, the Commission should be mindful of these terms, their relationship to one another, and what implications this might have for the crafting of a sex equality principle in accordance with the Commission's charge.

The staff wants to offer a brief disclaimer that, as noted in previous Commission discussions on this topic, our cultural and societal understanding of these terms and the concepts that they represent has been changing (and continues to evolve). The treatment below is very brief, but is intended to simply provide an initial, general description to advance the Commission's understanding of its task. **While the treatment below is not intended to be exhaustive, the staff welcomes suggestions for improving the inclusiveness of the descriptions generally.**

"Sex"

Traditionally in western cultures, sex has been understood as referring to biological sex, which was regarded as a binary characteristic whereby an individual would be classified as either male or female based on biological attributes. The website for the U.S. Centers for Disease Control ("CDC") provides the following definition for "sex": "[a]n individual's biological status as male, female, or something else. Sex is assigned at birth and associated with physical attributes, such as anatomy and chromosomes."[11]

The "something else" in the CDC's definition highlights the growing awareness about the incomplete nature of the sex binary and the wider biological variation of individuals, whose biological traits do not fully align with this

10. LGBTQIA+ stands for lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual or ally, and the plus to include other identities on the gender or sexuality spectrum. See M. Gold, The ABCs of LGBTQIA+, N.Y. Times (updated Jun. 7, 2019), *available at* https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html (hereafter, "NYT Article"); see also https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/sexual-orientation ("Abbreviations such as LGBTQ, LGBTQ+, LGBTQIA, and LGBTQIA+ may also be used to refer to multiple groups. The form 'LGBT' is considered outdated, but there is not consensus about which abbreviation including or beyond LGBTQ to use. If you use the abbreviation LGBTQ (or a related one), define it and ensure that it is representative of the groups about which you are writing.").

11. https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm.

binary.[12] "Intersex" is an "umbrella term for differences in sex traits or reproductive anatomy."[13]

"Gender"

Very generally, while "sex" involves biological traits (as described above), "gender" involves social or cultural characteristics or expectations, which can involve binary categories as discussed above.[14] For instance, the World Health Organization defines gender as "the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other."[15]

Gender is also used in the context of gender identity and gender expression. Gender identity refers to "[a]n individual's sense of their self as man, woman, transgender, or something else."[16] Again, the "something else" can include a wider range of options that may combine different masculine and feminine characteristics, reject the binary notion of gender, or encompasses multiple genders.[17] Gender expression is "[h]ow an individual chooses to present their gender to others through physical appearance and behaviors, such as style of hair or dress, voice, or movement."[18] Gender expression can also relate to gender stereotypes (i.e., when an individual's gender expression is different from the stereotypical expectations associated with gender).[19]

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12. See generally https://interactadvocates.org/faq/; C. Ainsworth, *Sex Redefined: The Idea of 2 Sexes is Overly Simplistic*, Nature Magazine (Oct. 22, 2018), *available at* https://www.nature.com/articles/518288a (article includes a spectrum with 9 categories of biological sex; the spectrum is bookended by the "typical male" and "typical female" categories); see also https://medlineplus.gov/ency/article/001669.htm (defining "intersex" and identifying four intersex categories).
13. https://interactadvocates.org/faq/.
14. See, e.g., https://orwh.od.nih.gov/sex-gender.
15. https://www.who.int/health-topics/gender#tab=tab_1. This source also states:

> Gender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs. Gender and sex are related to but different from gender identity. Gender identity refers to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth.

Id.
16. https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm.
17. See generally, e.g., definitions of gender-related terms at https://www.hrc.org/resources/glossary-of-terms; https://pflag.org/glossary; https://itgetsbetter.org/glossary/; see also NYT Article, *supra* note 10; https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq.
18. https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm.
19. See, e.g., *id.* (defining gender nonconforming as "[t]he state of one's physical appearance or behaviors not aligning with societal expectations of their gender (a feminine boy, a masculine girl, etc.).").

The National Institutes of Health website provides a brief discussion of the relationship between sex and gender:

> A person's gender identity (e.g., woman, man, trans man, gender-diverse, nonbinary) is self-identified, may change throughout their life, and may or may not correspond to a society's cultural expectations based on their biological sex traits. For example, a person with typical female (sex term) sex traits may or may not be a woman (gender identity). Although gender is often portrayed and understood in Western cultures using binary categories (man or woman) and is often assumed at birth based on a person's sex traits, many cultures throughout history have recognized a diversity of forms of gender identity and gender expression (how a person communicates their gender to others through behavior and appearance).[20]

"Cisgender" and "transgender" refer to the relationship between an individual's assigned sex and gender identity.[21] Different gender categories can recognize that a person's gender identity and gender expression may change over time and can include an explicit rejection of the idea of a binary assignment.[22] And, some gender identities are culture specific.[23]

"Sexual Orientation"

Sexual orientation is defined as "the desire one has for emotional, romantic, and/or sexual relationships with others based on their gender expression, gender

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20. *Id.*

21. See generally https://dictionary.apa.org/cisgender (defining "cisgender" as "having or relating to a gender identity that corresponds to the culturally determined gender roles for one's birth sex"); https://dictionary.apa.org/transgender (defining "transgender" as "having or relating to a gender identity that differs from the culturally determined gender roles for one's birth sex.").

22. See, e.g., E. Matsuno et al., Am. Psychol. Ass'n Div. 44 (Soc'y for the Psychol. of Sexual Orientation and Gender Diversity), Nonbinary Fact Sheet, *available at* https://www.apadivisions.org/division-44/resources/nonbinary-fact-sheet.pdf ("The term nonbinary is used both as an umbrella term and a gender identity label to refer to people whose gender does not fall within the binary categories of man and woman. … There are several different identity labels and experiences that fall under the nonbinary umbrella. For example, some people experience an absence of gender (e.g., agender, genderless), others experience a presence of multiple genders (e.g., bigender, pangender), others fluctuate between different genders (e.g., genderfluid, genderflux), or identify with third gender in-between or outside the gender binary (e.g., genderqueer, neutrois), and some partly identify with being a man or woman (e.g., demiboy, demigirl).").

23. See generally J.A. Clarke, *They, Them, Theirs*, 132 Harv. L. Rev. 894, 932 (Jan. 2019) ("Researchers highlight that nonbinary genders have existed 'across time and place' to challenge the view that humanity is naturally and inevitably divided into male and female categories. Historical and present-day examples include Indian Hijra, Thai Kathoey, Indonesian Waria, various Two-Spirit identities of First Nations tribes, and South American Machi identities, among others, each with a distinct meaning not reducible to man or woman."); https://www.pbs.org/independentlens/content/two-spirits_map-html/.

identity, and/or sex."[24] "[S]exual orientation is usually discussed in terms of three categories: heterosexual (having emotional, romantic or sexual attractions to members of the other sex), gay/lesbian (having emotional, romantic or sexual attractions to members of one's own sex) and bisexual (having emotional, romantic or sexual attractions to both men and women)."[25] But, as in the cases above, the traditional (binary-focused) understanding of sexual orientation is expanding to encompass a more diverse set of identities that reflect our growing understanding of the complexities of sex, gender, and orientation.[26]

"Sex or Gender Stereotypes"

Sex or gender stereotypes are cultural and societal expectations about attire, behavior, and related matters that involve a person's perceived sex or gender. Much of the discussion of sex or gender stereotypes focuses on stereotypes connected to male/female binary discussed above (i.e., masculine or feminine traits).

The website of the United Nations Office of the High Commissioner for Human Rights includes a discussion of gender stereotypes, which provides, in part:

> A gender stereotype is a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by, or performed by, women and men. A gender stereotype is harmful when it limits women's and men's capacity to develop their personal abilities, pursue their professional careers and/or make choices about their lives.
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> Whether overtly hostile (such as "women are irrational") or seemingly benign ("women are nurturing"), harmful stereotypes perpetuate inequalities. For example, the traditional view of women as care givers means that child care responsibilities often fall exclusively on women.

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24. https://itgetsbetter.org/glossary/.
25. https://www.apa.org/topics/lgbtq/orientation.
26. See NYT Article, *supra* note 10 ("Times and attitudes have changed, and the language used to discuss sexual orientation and gender identity has also changed. As a result, the established L.G.B.T. [Lesbian, Gay, Bisexual, Transgender] abbreviation has acquired a few extra letters — and a cluster of ancillary terminology around both sexuality and gender."); see also sources cited at *supra* note 17; https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/sexual-orientation.

As described on the American Psychiatric Association's website, sexual orientation addresses two concepts: the degree of attraction an individual feels and the gendered directionality of that attraction. "[S]exual orientation indicates the gendered directionality of attraction, even if that directionality is very inclusive (e.g., nonbinary). Thus, a person might be attracted to men, women, both, neither, masculinity, femininity, and/or to people who have other gender identities such as genderqueer or androgynous, or a person may have an attraction that is not predicated on a perceived or known gender identity."*Id.*

> Further, gender stereotypes compounded and intersecting with other stereotypes have a disproportionate negative impact on certain groups of women, such as women from minority or indigenous groups, women with disabilities, women from lower caste groups or with lower economic status, migrant women, etc.
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> …
>
> Wrongful gender stereotyping is a frequent cause of discrimination against women. It is a contributing factor in violations of a vast array of rights such as the right to health, adequate standard of living, education, marriage and family relations, work, freedom of expression, freedom of movement, political participation and representation, effective remedy, and freedom from gender-based violence.[27]

Gender stereotypes can, as indicated above, involve broad expectations about an individual's societal role and responsibilities based on gender, but can also involve specific expectations related to appearance and clothing choices.

SELECT FEDERAL LAWS RELATED TO WORKPLACE SEX DISCRIMINATION

As the Commission considers the scope of its task to address sex discrimination and disparate treatment in state law, the history of the federal laws related to employment sex discrimination may provide helpful context. While other related bodies of law may be similarly instructive (and the staff welcomes suggestions for additional materials to review), the employment discrimination laws have a significant body of case law that addresses many key issues as to the scope of "sex" as indicated below.

Below, this memorandum describes select employment-related federal laws that address sex discrimination – the federal Equal Pay Act and the federal Civil Rights Act of 1964 (and amendments of that Act by the Pregnancy Discrimination Act of 1978). The history and development of these laws can provide a helpful context to inform the development of laws to protect against sex discrimination.

Equal Pay Act of 1963

In 1963, Congress enacted the federal Equal Pay Act of 1963. Section 2 of the Act declares the purpose of the act to correct wage differentials based on sex.[28] The language of the act provides, in part,

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such

27. https://www.ohchr.org/en/women/gender-stereotyping.
28. P.L. 88-38, 77 Stat. 56.

> employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[29]

While this law was intended to be a sweeping remedy to address long-standing inequities in pay based on an "ancient, but outmoded belief" relating to male and female roles in society, the law's practical effect has been more limited in scope.[30]

One important way the Equal Pay Act's effect has been blunted is the broad interpretation that courts have accorded the "factor other than sex" defense. Courts have found that employers may consider prior salaries as a "factor other than sex" (thereby perpetuating existing sex-based salary inequities).[31] And, some courts have concluded that employers are not required to demonstrate that the "factor other than sex" offered to justify disparate treatment is related to a legitimate business purpose.[32]

Since 1997, federal legislation to address these issues, as well as others, has been introduced repeatedly, but has yet to become law.[33]

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29. 29 U.S.C. § 206(d)(1).

30. See generally Nat'l Womens L. Center, Closing the "Factor Other than Sex" Loophole in the Equal Pay Act (Apr. 11, 2011), *available at* https://nwlc.org/wp-content/uploads/2015/08/4.11.11_factor_other_than_sex_fact_sheet_update.pdf; https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/.

31. See generally Nat'l Womens L. Center, Closing the "Factor Other than Sex" Loophole in the Equal Pay Act (Apr. 11, 2011), *available at* https://nwlc.org/wp-content/uploads/2015/08/4.11.11_factor_other_than_sex_fact_sheet_update.pdf.

32. *Id.*

33. See https://en.wikipedia.org/wiki/Paycheck_Fairness_Act (identifying numerous Paycheck Fairness Act bills); see also https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/; Summary of H.R. 7 (Paycheck Fairness Act) (2021-2022), *avaialble at* https://www.congress.gov/bill/117th-congress/house-bill/7; H.R. 7, § 2(b)(4) ("The bona fide factor defense … shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue."), *available at* https://www.congress.gov/bill/117th-congress/house-bill/7/text.

In the staff's view, the history of this Act highlights the need to craft measures intended to promote equality in a manner that avoids perpetuating existing inequalities.

It is worth noting that California law related to equal pay appears to be more stringent than federal law on this point.[34] Specifically, California law expressly states that "[p]rior salary shall not justify any disparity in compensation."[35]

Similarly, California law was amended recently to expressly prohibit employers from asking about salary history and to prohibit an employer from relying on salary history to determine what salary to offer.[36]

Civil Rights Act of 1964 (Title VII)

Title VII of the federal Civil Rights Act of 1964 ("Title VII") includes a provision that protects against sex discrimination in employment. That provision provides, in part:

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…[37]

The scope of what constitutes "discriminat[ion] against any individual … because of … sex" has been heavily litigated and, the case law addresses many of the questions about the scope of sex discrimination presented above in this memorandum.

The staff notes that California has both a constitutional protection for employment,[38] as well as a statutory employment discrimination protection (part of California's Fair Employment and Housing Act), which is briefly noted later in

34. See generally https://www.dir.ca.gov/dlse/california_equal_pay_act.htm.
35. Lab. Code § 1197.5(a)(4).
36. https://www.dir.ca.gov/dlse/california_equal_pay_act.htm ("Effective January 1, 2018, Labor Code section 432.3 prohibits an employer from, either orally or in writing, personally or through an agent, asking any information concerning an applicant's salary history information, which includes compensation as well as benefits. Furthermore, the law prohibits an employer from relying on an applicant's salary history information as a factor in determining whether to offer employment at all or in determining what salary to offer.").
37. 42 U.S.C. § 2000-e2(a).
38. Cal. Const. art. I, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.").

this memorandum.[39] California's statutory law is similar to the federal law, however California law expressly identifies more prohibited bases for employment discrimination than the federal law.[40]

Legislative History

To provide a fuller picture of the treatment of sex discrimination under Title VII, the legislative history of the federal Civil Rights Act may provide some useful background.

The Act was proposed by John F. Kennedy in 1963.[41] After Kennedy was assassinated, President Johnson pushed the bill forward and it was signed in 1964.

While the Act prohibits discrimination on several grounds, the timing of the Act and the legislative history indicates that the prohibition on race discrimination was the central focus for this legislation.[42] Sources indicate that the addition of sex to the Act's list of prohibited grounds for discrimination during the legislative process was a disingenuous effort to defeat the legislation.

> In a mischievous attempt to sabotage the bill, a Virginia segregationist introduced an amendment to ban employment discrimination against women. That one passed, whereas over 100 other hostile amendments were defeated. In the end, the House approved the bill with bipartisan support by a vote of 290-130.[43]

39. See discussion of "California Law" *infra*; see also generally Gov't Code §§ 12940-12954; https://calcivilrights.ca.gov/employment/.

40. Gov't Code § 12940 (prohibiting employment discrimination on the following bases: "race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person").

41. See generally https://www.history.com/topics/black-history/civil-rights-act; https://en.wikipedia.org/wiki/Civil_Rights_Act_of_1964.

42. See generally https://www.archives.gov/milestone-documents/civil-rights-act.

43. https://www.history.com/topics/black-history/civil-rights-act; see also https://now.org/about/history/founding-2/ ("The Civil Rights Act of 1964 came to Congress, and feminists lobbied hard for the addition of an amendment prohibiting sex discrimination in employment. After much debate, the Act was passed with just such a prohibition in Title VII—added by a congressman who hoped to defeat the Act by including sex."); https://www.archives.gov/women/1964-civil-rights-act.

For a discussion of how this amendment's legislative history may reflect a strategic move by women's rights advocates who had laid the groundwork for this change and sheperded it through the legislative process. See R. Onion, *The Real Story Behind "Because of Sex,"* Slate (Jun 16, 2020), *available at* https://slate.com/news-and-politics/2020/06/title-vii-because-of-sex-howard-smith-history.html.

The potential controversy around the addition of sex appears to be due, at least in part, to concerns that sex-specific protective workplace laws would be at odds with a ban on sex-based employment discrimination[44]

Narrow View of Sex Discrimination

Early on, courts (and the Equal Employment Opportunity Commission ("EEOC"), the federal agency created to enforce Title VII[45]) considered what types of acts would constitute discrimination because of sex. And, initially, the courts and EEOC took a very narrow view – effectively finding that only rules that treated the entire class of women differently than the entire class of men would constitute prohibited discrimination under the Act.

For instance, "the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory."[46]

And, initially, courts found that rules that discriminated against married women or mothers did not constitute sex discrimination, as these classifications were purportedly based on marital status or being a parent.[47]

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44. See R. Onion, *supra* note 43 ("In the early 20th century, the Supreme Court basically said that all these attempts by labor unions to get the government to limit hours that laborers have to work, or protect health and safety, were not the business of the government, since that interfered with the 'right to contract.' … [D]espite generally refusing the demands of labor, courts did say that governments could pass laws to protect women workers—because they're supposedly more delicate, fragile, and special. … Some people thought that something like an Equal Rights Amendment for women, or even just adding 'because of sex' to Title VII, would eliminate those protections for women. Would that be better, or worse, for women? That was a question of belief." (citation omitted)); see also generally, e.g., T.A. Thomas, *From 19th Amendment to ERA*, 20 Am. Bar Ass'n Insights on L. and Soc'y (Jan. 22, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/from-19th-amendment-to-era/.

45. See https://www.eeoc.gov/youth/timeline-important-eeoc-events.

46. See *Bostock v. Clayton County* (2020) 590 U.S. __, 140 S. Ct. 1731, 1752, *citing* C. Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1340 (2012) (which, in turn, cites a Sept. 22, 1965 EEOC press release); see also https://now.org/about/history/founding-2/.

47. See generally C. Franklin, *Living Textualism*, 2020 Sup. Ct. Rev. 119, 173-174.

Compare, e.g., *Stroud v. Delta Air Lines, Inc.* (5th Cir. 1977) 544 F.2d 892, 893 (finding plaintiff suffered no sex discrimination being subject to a no marriage rule; "[C]ertain women stewardesses who are unmarried are favored over certain other women stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy.") with *Sprogis v. United Air Lines, Inc.* (7th Cir. 1971) 444 F.2d 1194, 1198, *cert. denied* 404 U.S. 991 ("It is irrelevant to this determination of discrimination that the no-marriage rule has been applied only to female employees falling into the single, narrowly drawn 'occupational category' of stewardess. Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position. Nor is the fact of discrimination negated by United's claim that the female employees occupy a unique position so that there is no distinction between members of opposite sexes within

This narrow view of what constituted prohibited sex discrimination under Title VII was troubling to many and prompted organizing related to civil rights for women, including the founding of the National Organization for Women.[48]

Sex-Plus Discrimination as Sex Discrimination

With some time, courts began to recognize that sex discrimination encompassed more than discrimination against the entire class of women as a whole. In particular, courts began to acknowledge that treating, for instance, married women different from married men or mothers different from fathers could also constitute prohibited sex discrimination under Title VII. The shorthand term used to describe this type of discrimination against a distinct segment of women (e.g., mothers, married women) has been referred to as "sex-plus discrimination." And, initially, the theory was that sex-plus discrimination was not "sex discrimination."[49]

In *Phillips v. Martin Marietta Corporation*, the U.S. Supreme Court considered a case where an employer had different hiring policies for women and men who had pre-school age children. The *per curiam* opinion stated:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under s 703(e) of the Act. But that is a matter of evidence tending to show that the condition in question 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'[50]

While this decision acknowledged that a hiring policy that treated mothers differently from fathers could run afoul of the law, it also left open the possibility that this rule could be justified as a bona fide occupational qualification. Justice Marshall's concurring opinion addressed the bona fide occupational qualification exception and the need for the exception to be construed narrowly:

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the job category."). See also https://airandspace.si.edu/stories/editorial/meet-flight-attendants-who-fought-equality-during-civil-rights-era.

48. See https://now.org/about/history/founding-2/.

49. See B. Friedan, Testimony before the Senate Committee on the Judiciary (Jan. 29, 1970), *available at* https://awpc.cattcenter.iastate.edu/2017/03/21/judge-carswell-and-the-sex-plus-doctrine-jan-29-1970/.

50. (1971) 400 U.S. 542, 544.

> …I cannot agree with the Court's indication that a 'bona fide occupational qualification reasonably necessary to the normal operation of' Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.
>
> But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.
>
> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.' Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a 'bona fide occupational qualification' was not intended to swallow the rule.
>
> That exception has been construed by the [EEOC], whose regulations are entitled to 'great deference,' to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex. Thus the exception would apply where necessary 'for the purpose of authenticity or genuineness' in the employment of actors or actresses, fashion models, and the like. If the exception is to be limited as Congress intended, the Commission has given it the only possible construction.
>
> When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.[51]

The *Phillips* case is generally recognized as the beginning of courts recognizing sex-plus discrimination as "sex discrimination" under Title VII.[52] In a 2009 legal journal article, the sex-plus doctrine under Title VII was summarized as follows:

> Under Title VII, courts have recognized specific protections for some "sex-plus" plaintiffs, that is, employees who are classified on the basis of sex plus some ostensibly neutral characteristic. Minority

51. *Id.* at 544-47 (Marshall, J., concurring) (citations omitted).

52. See, e.g., F. Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender,"and "Sexual Orientation" in Euro-American Law and Society* 83 Calif. L. Rev. 1, 148 (1995).

> women, married women, and women with young children receive special protection under the "sex-plus" doctrine but not all gender subclasses are protected. To prevail on a "sex-plus" claim, a plaintiff must demonstrate that individuals of the opposite sex who did not possess the plaintiff's additional characteristic were treated more favorably.[53]

The staff notes that it is not entirely clear what types of characteristics constitute "plus" characteristics for the purposes of this doctrine. Court decisions from the years just following the *Phillips* decision declined to recognize certain plus considerations,[54] a recent Supreme Court decision suggests a broad view of what types of characteristics could be plus considerations.[55]

Pregnancy Discrimination as Sex Discrimination

The legal history of Title VII's treatment of pregnancy has been more complicated, involving both litigation and legislation.

This complication seems to arise, at least in part, because pregnancy can only be experienced by certain workers.[56] As indicated below, courts seem to struggle to identify to whom a worker claiming pregnancy discrimination should be compared.[57] Viewed in one light, simply failing to address and accommodate pregnancy in the workplace could be, as in the material quoted below, described as facially nondiscriminatory (as the rule applies equally to everyone), but this ignores the very real practical consequences of such a rule will fall entirely on pregnant workers, a class that is necessarily circumscribed based on sex-based reproductive traits.

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53. L.C. Bornstein, *Title VII of the Civil Rights Act of 1964*, 10 Geo. J. Gender & L. 639, 643 (2009) (footnotes omitted). The example cited for a gender subclass that is not protected is men with long hair. *Id*. at n. 31 (citing *Willingham v. Macon Tel. Publ'g Co*. (5th Cir. 1975) 507 F.2d 1084, 1092).

54. See, e.g., *supra* note 53 (men with long hair); *Smith v. Liberty Mut. Ins. Co.* (5th Cir. 1978) 569 F.2d 325, 327 (declining to find sex discrimination where "the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate'").

55. See, e.g., *Bostock v. Clayton County* (2020) 590 U.S. __, 140 S.Ct. 1731, 1742 ("Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee.").

56. See generally C.M Cahill, *The New Maternity*, 133 Harv. L. Rev. 2221, 2284-88 (May 2020).

57. See generally W.W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. of L. & Social Change 325 (1984-85), *available at* https://socialchangenyu.com/wp-content/uploads/2017/12/WENDY-W.-VILLIAMS_RLSC_13.2.pdf.

In 1976, the U.S. Supreme Court considered whether an employer's exclusion of pregnancy-related disabilities from its disability insurance "package" constituted sex discrimination under Title VII. The Court found, contrary to EEOC guidelines, that this exclusion was not sex discrimination:

> The "package" … is facially nondiscriminatory in the sense that "(t)here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." … For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.[58]

Not long after that decision, Congress amended Title VII by enacting the Pregnancy Discrimination Act of 1978.[59] That Act included a provision that expressly defined sex to include pregnancy. Specifically, the act added the following language to the law:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…..[60]

Although the enactment of this law makes clear that pregnancy discrimination is sex discrimination for the purposes of Title VII,[61] this law did not fully resolve the obligations of employers with respect to pregnant employees, as can be seen in later case law (discussed below). In particular, courts were asked to consider the responsibility of an employer, under this law, to provide accommodations to

58. *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 138-39 (citations omitted).
59. See Pub. L. 95-555 (1978).
60. See 42 U.S.C. § 2000e(k).
61. See J.C. Suk, *Justice Ginsberg's Cautious Legacy for the Equal Rights Amendment*, 110 Geo. L. J. 1391, 1410-11 (2022) ("In the years following the ERA's adoption by Congress, the number of women elected to Congress doubled, and they formed a bipartisan Congresswomen's Caucus in 1977, which organized efforts to advance legislation on women's issues, including pregnancy discrimination and the ERA deadline extension. Congress overruled *Gilbert v. General Electric* by adopting the Pregnancy Discrimination Act in 1978, in the same month that it voted to extend the ERA deadline. The statute provided that discrimination because of sex under Title VII encompassed discrimination because of pregnancy, childbirth, or related medical conditions. But the statutory intervention did not change the status of pregnancy discrimination under the Equal Protection Clause." (citations omitted)).

pregnant workers in their workplace (e.g., a stool to avoid extended periods of standing) or assignments (e.g., light duty assignment to avoid heavy lifting).

In 2015, the U.S. Supreme Court considered a pregnancy discrimination claim based on the employer's failure to offer an accommodation to a pregnant employee. In *Young v. UPS*, the pregnant employee, a UPS driver, was directed by medical practitioners not to lift more than 20 pounds, due to pregnancy.[62] This limitation conflicted with a general requirement of UPS that drivers be able to lift 70 pounds.[63] Rather than offer an accommodation (e.g., a temporary light duty assignment), UPS simply told Young that she could not work while under a lifting restriction.[64] In assessing whether UPS's practice of granting accommodations to certain classes of workers (i.e., those injured on the job, those with a disability covered by the Americans with Disabilities Act,[65] those who lost their Department of Transportation certification), but not pregnant workers was discriminatory,[66] the court stated:

> In our view, the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here — as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence — it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. *Ultimately the court must determine whether the nature of the employer's*

62. *Young v. United Parcel Serv.* (2015) 575 U.S. 206, 211.
63. *Id.*
64. *Id.*
65. The decision indicates that the Americans with Disabilities Act ("ADA") was amended in a manner that could affect the treatment of pregnancy-related disabilities. See *id.* at 218 (ADA "then protected only those with permanent disabilities"), 218-19 ("We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities. As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job." (citation omitted)).

Later commentary (and enactment of the Pregnant Workers Fairness Act) indicates that, in practice, these 2008 ADA changes did not sufficiently address the law governing pregnancy-related accommodation. See A Better Balance, The Pregnant Workers Fairness Act Legal Backgrounder (updated Jan. 12, 2023), *available at* https://www.abetterbalance.org/wp-content/uploads/2020/02/Long-Overdue-Primer-PWFA.pdf ("[E]ven though Congress expanded the ADA in 2008 and in theory it should provide accommodations for workers with pregnancy-related disabilities, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.

As one court recently concluded in 2018, "Although the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions." (citation omitted)).
66. *Young*, 575 U.S. at 211-212.

> *policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination.*[67]

The decision indicates that the lower courts considered whether, as a pregnant worker, Young was similarly situated to the workers granted accommodation under UPS policy versus other injured workers who would not be granted accommodation.[68] While commentary indicates that the *Young v. UPS* decision is an important step forward for pregnant workers (as the decision indicates that pregnancy accommodations may be required in some circumstances), the decision's multi-step balancing test for assessing when such accommodations must be extended to pregnant employees left many questions unanswered.[69]

Late last year, the federal Pregnant Workers Fairness Act was enacted.[70] That law provides more clarity as to when employers are obligated to provide accommodations to pregnant workers. Specifically, the Pregnant Workers Fairness Act provides an employer must "make reasonable accommodations to the known limitations [of an employee] related to the pregnancy, childbirth, or related medical conditions…unless…the accommodation would impose an undue hardship on the" employer's business operations.[71]

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67. *Id.* at 210-11 (emphasis added and citation omitted).

68. *Id.* at 217-18 (summarizing the Fourth Circuit opinion and conclusions regarding to whom Young should be compared as follows:

> [I]t believed that Young was different from those workers who were "disabled under the ADA" (which then protected only those with permanent disabilities) because Young was "not disabled"; her lifting limitation was only "temporary and not a significant restriction on her ability to perform major life activities." Young was also different from those workers who had lost their DOT certifications because "no legal obstacle stands between her and her work" and because many with lost DOT certifications retained physical (i.e., lifting) capacity that Young lacked. And Young was different from those "injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury." Rather, Young more closely resembled "an employee who injured his back while picking up his infant child or ... an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter," neither of whom would have been eligible for accommodation under UPS' policies.

(citations omitted)).

69. Nat'l Women's Law Center, The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job Factsheet (Aug. 2021), *available at* https://nwlc.org/wp-content/uploads/2021/02/PWFA-Making-Room-for-Pregnancy-v4.2-2021.pdf; see also Nat'l Partnership for Women and Families, The Pregnant Workers Fairness Act Factsheet (Mar. 2021), *available at* https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/fact-sheet-pwfa.pdf; see also L. Prine, L. Morris, & G. deFiebre, Helping Pregnant Women Keep Their Jobs, 94 Am. Family Physician 494 (Sept. 15, 2016), *available at* https://www.aafp.org/dam/brand/aafp/pubs/afp/issues/2016/0915/p494.pdf.

70. Federal Pregnant Workers Fairness Act, enacted as part of H.R. 2617, 117th Cong. (2022), Pub. L. No. 117-328; see also J.L. Grossman, The Pregnant Workers Fairness Act: A Long-Awaited Victory for Pregnant Workers, Verdict from Justia (Jan. 6, 2023) https://verdict.justia.com/2023/01/06/the-pregnant-workers-fairness-act-a-long-awaited-victory-for-pregnant-workers.

71. H.R. 2617, Division II § 103(1).

Harassment as Sex Discrimination

In describing the legal history regarding Title VII sex discrimination claims based on harassment, Professor Reva B. Siegel wrote:

> At first, courts simply refused to acknowledge that sexual harassment had anything to do with employment discrimination on the basis of sex. Sexual harassment was rejected as a personal matter having nothing to do with work or a sexual assault that just happened to occur at work. Alternatively, judges reasoned that sexual harassment was natural and inevitable and nothing that law could reasonably expect to eradicate from work. But the central ground on which courts resisted recognizing the claim was simply that sexual harassment was not discrimination "on the basis of sex." It could happen to a man or woman or both; even if its harms were inflicted on women only, they were not inflicted on all women, only those who refused their supervisors' advances.[72]

This initial reluctance of courts to recognize harassment as sex discrimination is similar to the issues discussed above (and relies on a similar objections to those for sex-plus discrimination claims, i.e., the harassment only affects a subclass of women).

In the mid-1980s, U.S. Supreme Court case law recognized that, consistent with EEOC guidelines, sexual harassment was a form of prohibited sex discrimination under Title VII.[73] The decision describes the history leading up to the court's determination:

> [I]n 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. … The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.
>
> In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic quid pro quo, where "such conduct has the purpose or effect of unreasonably interfering with an individual's

72. R.B. Siegel, *Introduction: A Short History of Sexual Harassment* to C.A. MacKinnon & R.B. Siegel, eds., Directions in Sexual Harassment Law, at 11 (2003) (citations omitted), *available at* https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_IntroductionAShortHistoryOfSexualHarrasmentLaw.pdf.

73. See *Meritor Sav. Bank v. Vinson* (1986) 477 U.S. 57.

> work performance or creating an intimidating, hostile, or offensive working environment."
>
> In concluding that so-called "hostile environment" (i.e., non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. …
>
> Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.[74]

In more recent cases, the U.S. Supreme Court provided more detail as to what harassment is actionable under Title VII, as well as addressing liability questions.[75]

In *Oncale v. Sundowner Offshore Services, Inc.*, the Court concluded that same-sex sexual harassment claims are covered by Title VII's sex discrimination prohibition.[76] The decision provides some additional explanation as to what forms of harassment could be sex discrimination:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] ... because of ... sex."[77]

74. *Id.* at 65-66 (citations omitted).
75. See, e.g., *Harris v. Forklift Sys., Inc.* (1993) 510 U.S. 17; *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742.
76. *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75.
77. *Id.* at 80-81.

Sex/Gender Stereotype Discrimination as Sex Discrimination

Another important legal development in employment discrimination law was the U.S. Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, a case involving a claim of sex discrimination based on the imposition of sex or gender stereotypes. As indicated below, these stereotypes can involve differentiated behavior expectations or dress and grooming standards for employees.

In *Price Waterhouse v. Hopkins*, the Court found that Title VII's prohibition on sex discrimination covered discrimination on the basis of a failure to conform to sex stereotypes.[78]

In that case, the plaintiff, Ms. Hopkins, had been advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances for partnership.[79] The plurality opinion stated:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.
>
> …
>
> The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a *woman* manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.[80]

Later cases applying the reasoning in *Price Waterhouse* concluded Title VII's sex discrimination protection should be understood to encompass gender and sexual

78. (1989) 490 U.S. 228.
79. *Id.* at 235.
80. *Id.* at 256-58.

orientation discrimination, as these forms of discrimination involve a failure to conform to expectations and stereotypes based on sex.[81] In a more recent U.S. Supreme Court case, discussed below, the Court determined that sexual orientation and gender discrimination are "sex discrimination" for the purposes of Title VII.

Sexual Orientation and Gender Identity Discrimination as Sex Discrimination

In 2020, the U.S. Supreme Court considered three consolidated cases involving claims of employment discrimination on the basis of sexual orientation and gender identity.[82] In *Bostock v. Clayton County*, the Court concluded that such discrimination was prohibited sex discrimination under Title VII.

> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both

81. See, e.g., *Schwenck v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1202 ("Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex — that is, the biological differences between men and women — *and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); *Glenn v. Brumby* (11th Cir. 2011) 663 F.3d 1312, 1317 ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held. … These instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*."); *Macy v. Holder* (April 20, 2012) EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7 ("Since *Price Waterhouse*, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in many scenarios involving individuals who act or appear in gender-nonconforming ways. And since *Price Waterhouse*, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in scenarios involving transgender individuals." (footnote omitted)); *Baldwin v. Foxx* (July 16, 2015) EEOC Appeal No. 0120133080, 2015 WL 4397641, at *7–8 ("Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. …. In the wake of *Price Waterhouse*, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed — based on their appearance, mannerisms, or conduct — as insufficiently 'masculine' or 'feminine.' But as the Commission and a number of federal courts have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

Sexual orientation discrimination and harassment '[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.'"(footnotes omitted)); see also cases identfied at https://www.eeoc.gov/wysk/examples-court-decisions-supporting-coverage-lgbt-related-discrimination-under-title-vii.

See also generally S. Buchert, Alliance for Justice Blog Post, Price Waterhouse v. Hopkins *at Thirty* (May 1, 2019), https://www.afj.org/article/price-waterhouse-v-hopkins-at-thirty/.

82. *Bostock v. Clayton County* (2020) 590 U.S. __, 140 S. Ct. 1731.

> of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.[83]

For the Commission's present purposes, it is also worth mentioning that, in the decision, the Court noted that the Equal Rights Amendment's language is "strikingly similar" to the language of Title VII (in discussing the scope of protection offered by those laws).[84]

The Court in *Bostock* expressly addressed concerns raised by the employers about the possible interaction with constitutional and statutory protections of religious liberties.[85] This issue is simply noted here as one that the Commission may need to look at in more detail as the study proceeds.

The EEOC website includes a page on sexual orientation and gender identity (or "SOGI") discrimination, which begins with a discussion of *Bostock*.[86] That page provides further detail as to what constitutes sex discrimination:

> As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) because customers or clients would prefer to work with people who have a different sexual

83. 140 S. Ct. at 1741-42.

84. 140 S. Ct. at 1751; *id.* at 1750-51 ("The employers assert that 'no one' in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language — which was strikingly similar to Title VII's — might also protect homosexuals from discrimination." (citations omitted)).

85. 140 S. Ct. at 1753-54 (noting the Free Exercise Clause of the First Amendment and the federal Religious Freedom Restoration Act). The Court noted that one of the employers unsucessfully raised a Religious Freedom Restoration Act defense, but declined to seek review of that decision. *Id.* at 1754. See *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.* (6th Cir. 2018) 884 F.3d 560.

86. https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination.

> orientation or gender identity. Employers also are not allowed to segregate employees based on actual or perceived customer preferences. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)
>
> Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.
>
> Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.[87]

Prior to and since the *Bostock* decision, there have been efforts to amend Title VII to expressly list sexual orientation and gender identity as prohibited grounds for discrimination.[88]

In early 2021 (after the *Bostock* decision), President Biden issued an executive order addressing SOGI discrimination. That order provides, in part:

> All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.
>
> These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation's anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended. In *Bostock v. Clayton County*, the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock*'s reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended, the Fair Housing Act, as amended, and section 412 of the Immigration and Nationality Act, as amended, along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

87. *Id.*

88. See generally https://en.wikipedia.org/wiki/Equality_Act_(United_States); https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-the-equality-act-will-provide-long-overdue-civil-rights-protections-for-millions-of-americans/.

> Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.
>
> It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.[89]

The order directs federal agencies to review agency actions (including regulations and policies) to "fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order [reproduced, in part, above]."[90]

CALIFORNIA LAW

California's anti-discrimination laws will be addressed in more detail in a future memorandum. However, for now, the staff simply wants to note that California has generally extended its anti-discrimination laws broadly to expressly cover many of the different issues discussed in this memorandum.

For instance, California's employment discrimination protection is found in the Fair Employment and Housing Act.[91] The Act expressly provides protection from discrimination on the following grounds: "reproductive health decisionmaking, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, … [and] sexual orientation."[92] Similarly, the Act provides express protection from harassment and defines "'harassment' because

89. Exec. Order No. 13988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

90. *Id.* § 2(b). For examples of agency actions consistent with this directive, see, e.g., U.S. Dep't of Justice Memorandum from Principal Deputy Assistant Attorney General Pamela S. Karlan re Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), *available at* https://www.justice.gov/crt/page/file/1383026/download; U.S. Dep't of Food and Ag. Food and Nutrition Serv. Policy Memo CRD 01-2022, Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update (May 5, 2022), *available at* https://www.fns.usda.gov/cr/crd-01-2022.

91. Gov't Code §§ 12900-12999. See also generally *Rojo v. Kilger* (1990) 52 Cal.3d 65 (discussing the relationship of the Fair Employment and Housing Act with other state laws and common law remedies for employment discrimination).

92. Gov't Code § 12940(a); see also *id.* § 12926(g), (*o*), (r), (s), (y) (providing definitions of certain terms).

of sex" to include "sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."[93]

And, California's Unruh Civil Rights Act provides, in part:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, … medical condition, genetic information, marital status, [or] sexual orientation, … are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[94]

This Act also expressly defines "sex" to include gender (including both gender identity and gender expression), as well as pregnancy, childbirth, and other related conditions.[95]

COMMISSION DECISION

The staff is seeking input from the Commission on how broadly to construe the language of the Commission's assignment that directs the Commission to address defects in California law related to discriminatory language and disparate impacts "on the basis of sex."

As discussed above, the history of federal law related to employment sex discrimination reveals a movement towards a broader understanding of what constitutes sex discrimination. Further, this broader understanding of "sex" is consistent with the policy direction taken in California's anti-discrimination laws, which provide broader express protections that specifically address many of the issues discussed in this memorandum.

For this reason, the staff believes that the Commission's assignment to address "sex" discrimination and disparate impacts should generally be construed broadly, encompassing the different issues and classes discussed in this memorandum.

How would the Commission like to proceed on this point? The staff also welcomes informal direction from the Commission on preferred terminology to use in future memoranda on this topic, to more clearly reflect the Commission's decision on scope.

93. Gov't Code § 12940(j)(4)(C).
94. Civ. Code § 51(b).
95. *Id.* § 51(e)(5); see also *id.* § 51(e)(2), (6), (7).

NEXT STEPS

The Commission will be considering the scope of the ERA's guarantee, specifically focused on the "equality of rights under the law" language. This analysis will include a discussion of equal protection law and the effect of the ERA on equal protection law related to "sex."

Respectfully submitted,

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